86-3210

Supreme Court, U.S.
FILED
AUG 29 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. .-.....

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1986

DEAN WITTER REYNOLDS INC. and BRENTON OGDEN,
Petitioners,
vs.
HARRY R. CONOVER,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

The United States Arbitration Act mandates the enforcement of arbitration agreements. This Court in *Dean Witter Reynolds Inc. v. Byrd*, 105 S.Ct. 1238, 1240 n. 1, 84 L.Ed.2d 158, 162 n. 1 (1985), however, left open the question of whether arbitration of claims arising under Section 10(b) of the Securities Exchange Act of 1934 can be compelled.

The question presented is whether the United States Arbitration Act mandates arbitration of a claim arising under Section 10(b) of the Securities Exchange Act of 1934, if that claim is otherwise referable to arbitration under an agreement between the parties.

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 794 F.2d 520 (9th Cir. 1986). The order of the district court (Pet. App. B) is not reported.

JURISDICTION

The judgment of the court of appeals was filed and entered on July 17, 1986. Jurisdiction in this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved in this case are set forth in full in the appendix (Pet. App. C). The citations to the statutes and regulations are as follows:

United States Arbitration Act,

Section 2, 9 U.S.C. § 2

Section 3, 9 U.S.C. § 3

Securities Act of 1933,

Section 12(2), 15 U.S.C. § 77*l*(2)

Section 14, 15 U.S.C. § 77n

Section 22(a), 15 U.S.C. § 77v(a)

Securities Exchange Act of 1934,

Section 10(b), 15 U.S.C. § 78j(b)

Section 29(a), 15 U.S.C. § 78cc(a)

Securities and Exchange Commission,

Rule 10b-5, 17 C.F.R. § 240.10b-5.

STATEMENT OF THE CASE

Plaintiff and respondent Harry R. Conover (hereinafter "respondent") filed his complaint in the federal district court against defendants and petitioners Dean Witter Reynolds Inc.[1] and Brenton Ogden (hereinafter "petitioners") on July 26, 1983. The complaint consists of a single claim for relief for alleged violation of § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) (hereinafter the "Exchange Act") and Rule 10b-5, 17

[1]Petitioner Dean Witter Reynolds Inc. is a wholly-owned subsidiary of Dean Witter Financial Services, Inc., which is itself a wholly-owned subsidiary of Sears, Roebuck & Co. Petitioner Brenton Ogden, now retired, was formerly a branch office manager of petitioner Dean Witter Reynolds Inc. and was the individual through whom respondent placed orders for his securities account with petitioners.

C.F.R. § 240.10b-5, promulgated thereunder by the Securities and Exchange Commission.

In his complaint, respondent alleges that § 27 of the Exchange Act, 15 U.S.C. § 78aa, is the basis for subject matter jurisdiction of the respondent's claim in the federal district court. Respondent further alleges that the action is brought under § 10(b) of the Exchange Act and Rule 10b-5.

The allegations supporting respondent's claim for relief include, *inter alia,* that respondent opened a securities account with petitioners, that petitioners "churned" and "manipulated" respondent's account, and that petitioners "forced the liquidation" of respondent's account "for the sole purpose of generating sales commissions" for petitioners.

Respondent commenced doing business with the predecessor of petitioner Dean Witter Reynolds Inc., Dean Witter & Co., Inc., in 1956. In August of 1960, the parties entered into a written agreement concerning their rights and obligations in connection with the opening of a margin account[2] by respondent. That contract, the "Customer's Agreement," contains a provision requiring arbitration of any controversy arising out of the conduct of the account. (Pet. App. D).

In light of petitioners' contract with the respondent to arbitrate any controversy arising out of respondent's

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[2]In a "margin account," a customer may purchase securities on margin, i.e., "under a financial arrangement with the stockbroker pursuant to which part of the purchase price of the securities is paid by the purchaser, with the balance (the 'margin') being collateralized by the securities purchased and financed by the broker to whom the purchaser-borrower pays interest for the amount financed." *Vernon v. Drexel Burnham & Co.,* 52 Cal.App.3d 706, 710, 125 Cal.Rptr. 147 (1975).

account, and in response to the then recent authority of *Dean Witter Reynolds Inc. v. Byrd*[3] to the effect that the arbitrability of claims under § 10(b) of the Exchange Act and Rule 10b-5 was an open question, petitioners filed a motion for an order compelling arbitration of respondent's claim under § 10(b) of the Exchange Act and Rule 10b-5 and staying further proceedings in the district court pending completion of the arbitration.

By its order entered June 12, 1985 (Pet. App. B), the United States District Court denied petitioners' motion, holding that the predispute agreement to arbitrate the claim at issue was unenforceable, and that even if the claim were arbitrable petitioners had waived[4] any right to arbitration. The United States Court of Appeals for the Ninth Circuit affirmed (Pet. App. A), holding that "the language and history of the securities statutes, considered against the background of controlling Supreme Court decisions and circuit court decisions stressing the importance of a federal judicial forum for Rule 10b-5 claims, require us to hold that the judicial forum for such claims cannot be waived by an arbitration agreement between a customer and a broker."

ARGUMENT

The decision of the court of appeals is incorrect and should be reviewed by this Court.

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[3]105 S.Ct. 1238, 1240 n.1, 84 L.Ed.2d 158, 162 n. 1 (1985).

[4]The district court's finding that petitioners waived their right to arbitration, though a secondary ground for the decision of the district court, was neither addressed by the court of appeals in its opinion nor relied upon as a ground for its decision, and is thus not a question presented by the instant petition.

1. The Decision Of The Court Of Appeals For The Ninth Circuit, While In Agreement With The Decisions Of The Second,[5] Third,[6] And Eleventh[7] Circuits, Conflicts With The Decision Of The Eighth[8] Circuit.

Since this Court's decision in *Dean Witter Reynolds Inc. v. Byrd,*[9] the courts of appeal which have considered the enforceability of agreements to arbitrate claims under § 10(b) of the Exchange Act have rendered conflicting decisions. The Second, Third, and Eleventh Circuits, relying to a great extent on the precedent of prior decisions within those circuits, have refused enforcement of agreements to arbitrate claims arising under § 10(b). In the instant case, the Ninth Circuit also denied enforcement of an agreement to arbitrate a § 10(b) claim, relying instead on its perception of conflicting policies evidenced by the statutes at issue, and of the applicability of the analysis and precepts of this Court's decision in *Wilko v. Swan.*[10] In contrast, the Eighth Circuit has held that agreements to arbitrate claims asserted under § 10(b) are enforceable, concluding that Congress created no

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[5]*McMahon v. Shearson/American Express, Inc.,* 788 F.2d 94 (2d Cir. 1986), *petition for cert. filed,* 55 U.S.L.W. 3032 (U.S. July 14, 1986) (No. 86-44) (requesting review by certiorari of the denial of arbitration of both a § 10(b) claim and a claim under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961, *et seq.*).

[6]*Jacobson v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,* No. 85-3282, slip op. (3d Cir. August 11, 1986).

[7]*Miller v. Drexel Burnham Lambert, Inc.,* 791 F.2d 850 (11th Cir. 1986) (per curiam).

[8]*Phillips v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,* No. 85-5156, slip. op. (8th Cir. July 9, 1986).

[9]105 S.Ct. 1238, 84 L.Ed.2d 158 (1985).

[10]346 U.S. 427 (1953).

exception to the mandate of the Arbitration Act for judicially implied rights of action under § 10(b) and Rule 10b-5.

Resolution of this conflict among the circuits is necessary in order to achieve uniform application of federal law. Parties in the Second, Third, Ninth, and Eleventh Circuits currently are being denied their contractual right to arbitration based on a misguided reading of this Court's decision in *Wilko v. Swan.*[11] In the instant case, for example, even the question which the Ninth Circuit perceived to be at issue was based on such a misguided reading. Noting that this Court in *Wilko* "recognized the tension between the respective policies of the Arbitration Act and the Securities Act of 1933,"[12] the Ninth Circuit concluded that the question was "whether congressional policy prohibits arbitration of claims arising under section 10(b) of the Securities Exchange Act of 1934, despite the strong federal policy favoring arbitration."[13]

The policy analysis that occurred in *Wilko,* however, was performed in the context of what was perceived to be a direct, statutory conflict between the express right of action for purchasers granted under § 12(2) of the Securities Act of 1933[14] (hereinafter the "Securities Act"), and § 2 of the United States Arbitration Act,[15] which mandates enforcement of arbitration agreements. In contrast, no such statutory conflict is present in the instant case where, as this Court noted in *Scherk v. Alberto-Culver*

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[11] *Id.*

[12] Pet. App. A at 6.

[13] *Id.*

[14] 15 U.S.C. § 77*l*(2).

[15] 9 U.S.C. § 2.

Co.,[16] "[t]here is no statutory counterpart of § 12(2) in the Securities Exchange Act of 1934, and neither § 10(b) of that Act nor Rule 10b-5 speaks of a private remedy to redress violations of the kind alleged here." In the absence of a direct statutory conflict, a purported analysis of the policies underlying the Exchange Act versus those underlying the Arbitration Act is both erroneous and unnecessary,[17] and the language of the Arbitration Act which this Court has held "[b]y its terms . . . mandates that district courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed"[18] must prevail.

Moreover, the *Wilko* decision was premised not only upon the language of § 14 of the Securities Act[19] declaring void any "condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this subchapter," but also upon the "special" nature of the right to recover under § 12(2) and the right under § 22(a) of the Securities Act[20] to bring

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[16]417 U.S. 506, 513 (1974).

[17]The Ninth Circuit appears to sidestep the absence of an express statutory private remedy under § 10(b) by relying on the nebulous concept of the "policy underlying the statute." Policies underlying statutes, however, are not intuited or divined, but result from statutory language. For example, this Court has noted that the "liberal federal policy favoring arbitration agreements" is "manifested by [§ 2 of the Arbitration Act] and the Act as a whole . . . ." *Mitsubishi Motors v. Soler Chrysler-Plymouth*, 105 S.Ct. 3346, 3353, 87 L.Ed.2d 444, 454 (1985).

[18]*Dean Witter Reynolds Inc. v. Byrd*, 105 S.Ct. at 1241, 84 L.Ed.2d at 163.

[19]15 U.S.C. § 77n.

[20]15 U.S.C. § 77v(a).

suit in either state or federal court.[21] The special nature of the right to recover for misrepresentations under § 12(2), where "the seller is made to assume the burden of proving lack of scienter,"[22] is not present in the judicially implied remedy under § 10(b) of the Exchange Act which is "not so different from the common law action."[23] The choice of forum under § 22(a), the "provision" which this Court held could not be waived under § 14 in *Wilko,* is similarly not present in § 29(a) of the Exchange Act[24] where jurisdiction is restricted to federal court. While the Ninth Circuit views this restriction as "an even more forceful indication of Congress' intent that federal courts oversee the interpretation and application of the 1934 Act",[25] exclusive federal jurisdiction over claims asserted under federal legislation would appear to be more normal than anomalous. If followed as a rule for inferring Congressional intent to prohibit arbitration, such a rule would foreclose arbitration of all federal statutory claims, which is a result that this Court recently rejected.[26]

In his concurring opinion in this Court's decision in *Byrd,* Justice White noted that "Wilko's reasoning cannot

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[21] *Wilko v. Swan,* 346 U.S. at 430-31.

[22] *Id.* at 431.

[23] *Dean Witter Reynolds Inc. v. Byrd,* 105 S.Ct. at 1244, 84 L.Ed.2d at 168 (White, J., concurring).

[24] 15 U.S.C. § 78aa.

[25] Pet. App. A at 16.

[26] *See, Mitsubishi Motors v. Soler Chrysler-Plymouth,* 105 S.Ct. at 3346, 3353, 87 L.Ed. 2d 444, 454 (1985) ("we find no warrant in the Arbitration Act for implying in every contract within its ken a presumption against arbitration of statutory claims").

be mechanically transplanted to the 1934 Act."[27] The factors and concerns which led this Court in *Wilko* to deny enforcement of arbitration agreements as to § 12(2) claims simply are not present with respect to § 10(b) claims. Therefore this Court should resolve the conflict between the circuit courts of appeal by holding that the Arbitration Act mandates arbitration of judicially implied claims under § 10(b) when those claims are otherwise referable to arbitration under an agreement between the parties.

2. The Decision Of The Court Of Appeals Is In Conflict With An Applicable Decision Of This Court.

The decision reached by the Ninth Circuit and the previous decisions of the Second and Eleventh Circuits on the instant issue appear to conflict with this Court's recent decision in *Mitsubishi Motors v. Soler Chrysler-Plymouth.*[28] Although this Court did not directly address the instant issue in *Mitsubishi,* in holding in that case that the Arbitration Act mandates arbitration of claims arising under the Sherman Act[29] in the context of an international commercial transaction, this Court rejected a number of the same justifications for denying arbitration advanced by the Ninth Circuit in the instant case. In denying arbitration of § 10(b) claims, the Ninth Circuit concluded that "[t]he policies served by judicial enforcement of section 10(b) and Rule 10b-5 reflect the unsuitability of arbitration for such claims," and as examples of these policies cited (1) the deterrent effect of redressing violations in federal court, (2) the alleged overbearing of securities dealers vis-a-vis securities customers, and (3)

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[27]105 S.Ct. at 1244, 84 L.Ed.2d at 167.

[28]105 S.Ct. 3346, 87 L.Ed.2d 444 (1985).

[29]15 U.S.C. § 1, *et seq.*

the purported need for judicial direction to insure the effectiveness of the protective provisions of the Exchange Act.[30] Each of these justifications for denying arbitration was asserted in *Mitsubishi* and rejected.

With respect to the alleged deterrent effect of actions by private litigants in federal court, in *Mitsubishi* this Court stated that "[n]otwithstanding its important incidental policing function, the treble-damages cause of action" under the antitrust laws "seeks primarily to enable an injured competitor to gain compensation for that injury."[31] That conclusion is even more compelling under the Exchange Act where compensation is limited to actual damages.[32] Moreover, like the antitrust claim at issue in *Mitsubishi*, a § 10(b) and Rule 10b-5 claim "remains at all times under the control of the individual litigant: no citizen is under an obligation to bring . . . suit" and the litigant "needs no executive or judicial approval before settling one."[33]

The allegation that "securities customers are subject to overbearing by securities dealers" was also considered by the *Mitsubishi* Court in the antitrust context and rejected as an "undemonstrated assumption that the arbitration clause is tainted."[34] The Court noted that a party resisting arbitration may directly attack the validity of the

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[30]Pet. App. A at 10-12.

[31]105 S.Ct. at 3359, 87 L.Ed.2d at 460.

[32]See § 28(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78bb(a) ("no person permitted to maintain a suit for damages under the provisions of this chapter shall recover . . . a total amount in excess of his actual damages on account of the act complained of").

[33]105 S.Ct. at 3359, 87 L.Ed.2d at 461.

[34]*Id.* at 3357, 87 L.Ed.2d at 459.

arbitration agreement if the party believes that the agreement was fraudulently procured.[35]

The focus by the Ninth Circuit on the bargaining position of parties to arbitration agreements reflects more than merely a concern for freely negotiated agreements. It also appears to reflect two underlying presumptions: (1) that the arbitration process is biased or unfair, and (2) that the statutory rights at issue cannot or will not be properly vindicated in arbitration. Both presumptions were explicitly rejected in *Mitsubishi*.[36] With respect to the former, this Court reasoned:[37]

> We decline to indulge the presumption that the parties and arbitral body conducting a proceeding will be unable or unwilling to retain competent, conscientious and impartial arbitrators.

With respect to the latter, the Court concluded:[38]

> By agreeing to arbitrate a statutory claim, a party does not forego the substantive rights afforded by the statute; it only submits to their resolution in an arbitral rather than a judicial forum. It trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.

A third factor noted by the Ninth Circuit as demonstrative of the unsuitability of § 10(b) claims for arbitration

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[35] *Id.* (citing *Prima Paint Corp. v. Flood & Conklin Mfg. Corp.*, 388 U.S. 395 (1967)).

[36] Both presumptions were partially supported by the Ninth Circuit in its opinion in the instant case by direct quotations from *Wilko v. Swan*. In light of this Court's ruling in *Mitsubishi*, to the extent *Wilko* can be read to support these presumptions it should be disapproved.

[37] *Id.* at 3358, 87 L.Ed.2d at 460.

[38] *Id.* at 3355, 87 L.Ed.2d at 456.

was the purported need for judicial direction to insure the effectiveness of the protective provisions of the 1934 Act. The Court also addressed this contention in *Mitsubishi* by observing that "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve its remedial and deterrent function."[39] The likelihood of such vindication in the § 10(b) context is enhanced by the fact that § 10(b) claims are "not so different from the common law action."[40] Claims for common law fraud are regularly sent to arbitration and resolved by arbitrators.[41] Since these justifications for denial of arbitration by the Ninth Circuit in the instant case were rejected by this Court in *Mitsubishi*, the decision in the instant case requires this Court's review.

3. The Decision Of The Court Of Appeals Will Serve To Increase Litigation In The Federal Courts.

The decision of the Ninth Circuit in the instant case, as well as the decisions of the Second, Third, and Eleventh Circuits on the issue, will have the practical effect of clogging federal court dockets with garden-variety broker/customer disputes which should be resolved in arbitration. The substantial increase in filings of Securities and Commodities Exchange civil cases in recent years,[42]

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[39] *Id.* at 3360, 87 L.Ed.2d at 462.

[40] *Dean Witter Reynolds Inc. v. Byrd*, 105 S.Ct. at 1244, 84 L.Ed.2d at 168 (White, J., concurring).

[41] *See, e.g., Southland Corp. v. Keating*, 465 U.S. 1, 4 (1984).

[42] During the twelve months ended June 30, 1980, 1,532 private civil actions classified as "Securities, Commodities, and Exchanges" suits were commenced in United States District Courts. Annual Report of the Director of the Administrative Office of the United States Courts, Table C2 at 375 (1980). For the twelve months ended June 30, 1985, 3,072 such actions were commenced. Annual Report of the Director of

many of them broker/customer disputes, suggests that enforcement of arbitration agreements with respect to claims under § 10(b) would ease the strain on the legal system in general and the judiciary in particular caused by such filings.

Compelling arbitration of the claim at issue in the instant case does not mean that all § 10(b) and Rule 10b-5 claims will be arbitrated. "The [Arbitration] Act, after all, does not mandate the arbitration of all claims, but merely the enforcement — upon the motion of one of the parties — of privately negotiated arbitration agreements."[43] Numerous actions based on § 10(b) and Rule 10b-5 claims will continue to be resolved by the federal courts where no arbitration agreements exist between the parties. Shareholder derivative actions and class actions are but two examples of these types of actions. Moreover, claims asserted under express, private rights of action granted by Congress under the Exchange Act would presumably be resolved in federal court regardless of the presence or absence of an agreement to arbitrate such claims. Important and novel questions of law arising under the Exchange Act would thus continue to be decided by the federal courts.

Many garden-variety broker/customer disputes, however, such as the one involved in the instant case, would be resolved in arbitration if agreements to arbitrate claims under § 10(b) are held to be enforceable.[44] The

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the Administrative Office of the United States Court, Table C2 at 283 (1985). Thus, in five years the number of such filings doubled. The increase in civil filings of all kinds increased by only 48% during the same period. *Id.*, Table 7 at 10.

[43] *Dean Witter Reynolds Inc. v. Byrd*, 105 S.Ct. at 1242, 84 L.Ed.2d at 164.

[44] Not all broker/customer disputes would be arbitrated were this Court to so hold. In the instant case, for example, respondent

predominant issues in dispute in such cases tend to be factual issues, not abstract legal questions. In the instant case, for example, the issues raised by respondent's complaint concern his allegation that petitioners forced the liquidation of his account for the purpose of generating sales commissions. The legal principles applicable to such a factual dispute are neither beyond the capacity of the parties to brief, or arbitrators to resolve. Furthermore, the Ninth Circuit's concern about arbitration, based on the language of *Wilko,* that since an "award may be made without explanation of their reasons and without a complete record of their proceedings, the arbitrators' conception of the legal meaning of such statutory requirements as 'burden of proof,' 'reasonable care' or 'material fact,' . . . cannot be examined,"[45] is unlikely to be cured in the judicial forum where the result is decided by a jury rendering a general verdict. As with an arbitration award, a general verdict rendered by a jury sets forth neither reasons for the verdict nor the jurors' conception of the meaning of abstract legal principles. In any event, as this Court stated in *Mitsubishi,* "we are well past the time when judicial suspicion of the desireability of arbitration and of the competence of arbitration tribunals inhibited the development of arbitration as an alternative means of dispute resolution."[46]

In *Scherk v. Alberto-Culver Co.,*[47] the Court referred to "[t]he exception to the clear provisions of the Arbitration

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Conover did not execute his agreement to arbitrate disputes with petitioners until he opened a margin account approximately four years after he commenced doing business with Dean Witter.

[45]Pet. App. A at 14.

[46]105 S.Ct. at 3354, 87 L.Ed.2d at 455.

[47]417 U.S. 506 (1974).

Act carved out by Wilko"[48] and held that the *Wilko* exception was inapposite to that case. The recognition of additional exceptions to the Arbitration Act, exceptions which Congress did not intend, will risk emasculating the Act and creating uncertainty and disuse of alternative dispute resolution mechanisms such as arbitration at a time when their use is desperately needed.

CONCLUSION

A review of the issue in the instant case by this Court will resolve a conflict between the circuit courts of appeal on an important question of federal law concerning the rights of contracting parties to arbitration, settle a conflict between a decision of a court of appeals and an applicable decision of this Court, and answer an important question of federal law with a substantial impact on federal court caseloads. For these reasons petitioners respectfully request that this petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit be granted.

DATED: August 27, 1986

Respectfully submitted,

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CRAIG R. BOCKMAN
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[48] *Id.* at 517.

APPENDIX A

No. 85-6082
D.C. # CV-83-4809-RMT

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

HARRY R. CONOVER,
Plaintiff-Appellee,

v.

DEAN WITTER REYNOLDS, INC., AND BRENTON OGDEN,
Defendants-Appellants,

and

SEARS, ROEBUCK & CO.
Defendant.

OPINION

Appeal from the United States District Court for the Central District of California
Robert M. Takasugi, District Judge, Presiding
Argued and submitted April 10, 1986
Pasadena, California

Before: SCHROEDER and NORRIS, Circuit Judges, and SOLOMON,* District Judge.

SCHROEDER, Circuit Judge.

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* Honorable Gus J. Solomon, Senior United States District Court Judge for the District of Oregon, sitting by designation.

I.

INTRODUCTION

This is an action by a customer against his securities broker for damages resulting from alleged violations of section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 of the Securities and Exchange Commission Rules. In this appeal by the broker, the issue is whether the claim should be submitted to arbitration under the arbitration provision of the parties' customer agreement. Relying upon the Supreme Court's decision in *Wilko v. Swan,* 346 U.S. 427 (1953), and subsequent decisions of this circuit, the district court denied the defendants' motion to compel arbitration.

The genesis of this appeal is Justice White's special concurring opinion in *Dean Witter Reynolds, Inc. v. Byrd,* 105 S. Ct. 1238 (1985). Justice White there questioned whether *Wilko's* holding, i.e. the non-arbitrability of claims arising under the Securities Act of 1933, applies to claims arising under the Securities Exchange Act of 1934. This is the first of a number of similar cases, involving arbitrability of customer claims against a broker under section 10(b) of the 1934 Act and Rule 10b-5, to reach this court since the Supreme Court's decision in *Byrd.*

We affirm the district court's ruling that claims under section 10(b) of the 1934 Act should be litigated in federal court rather than submitted to arbitration. For the reasons discussed below, we conclude that the language and history of the securities statutes, considered against the background of controlling Supreme Court decisions and circuit court decisions stressing the importance of a federal judicial forum for Rule 10b-5 claims, require us to hold that the judicial forum for such claims cannot be waived by an arbitration agreement between a customer and broker.

II.

BACKGROUND

Plaintiff-appellee, Harry Conover, opened a margin account with Dean Witter Reynolds, Inc., in 1960 and signed a form "customer agreement," which contained the following arbitration provision:

> 16. Any controversy between you and the undersigned arising out of or relating to this contract or the breach thereof, shall be settled by arbitration, in accordance with the rules . . . of either the Arbitration Committee of the Chamber of Commerce of the State of New York, or the American Arbitration Association, or the Board of Arbitration of the New York Stock Exchange . . . .

In July, 1983, Conover brought this suit against Dean Witter and the broker who handled Conover's account, Brenton Ogden. Conover alleged that the defendants "churned" and manipulated his account to generate sales commissions, in violation of section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and Rule 10b-5 promulgated thereunder, 17 C.F.R. § 240.10b-5.

On May 10, 1985, shortly after the Supreme Court's decision in *Byrd*, Dean Witter filed a motion to compel arbitration of Conover's section 10(b) claim and to stay further proceedings pending completion of that arbitration. The motion stressed Justice White's concurrence in *Byrd*, and urged that arbitration provisions of a customer agreement should constitute a waiver by the customer of a judicial forum for section 10(b) claims.

In discussing the waiver issue, Justice White posed a question which the parties had not raised and which the Court did not need to decide in *Byrd*. Indeed, as Justice White observed, the very "premise of the controversy" in *Byrd* was that the plaintiff's claims in that case under the

1934 Act were not arbitrable, in spite of the arbitration agreement. *Byrd*, 105 S. Ct. at 1244 (White J., concurring).

This assumption of non-arbitrability of section 10(b) claims is one that this court has shared. It is reflected in several Ninth Circuit Court decisions after the Supreme Court's decision in *Wilko*, and before its opinion last year in *Byrd*. *See Kehr v. Smith Barney, Harris Upham & Co.*, 736 F.2d 1283, 1285 n.1 (9th Cir. 1984); *Kershaw v. Dean Witter Reynolds, Inc.*, 734 F.2d 1327, 1328 (9th Cir. 1984); *De Lancie v. Birr, Wilson & Co.*, 648 F.2d 1255, 1257 (9th Cir. 1981). Commentators also had assumed that *Wilko* applied to claims arising under Section 10(b) of the 1934 Act. *See e.g.*, A. Jacobs, *The Impact of Rule 10b-5*, § 237.02 (1980) ("An agreement to arbitrate future claims under the 1933 Act or the 1934 Act . . . is voidable"); S. Jaffe, *Broker-Dealers and Securities Markets* § 1702 (1977) (Noting, without discussion, that *Wilko's* holding applies to claims arising under the 1934 Act); A. Bromberg & L. Lowenfels, 2 *Securities Fraud & Commodities Fraud* § 5.16 (410) (1985) (same).

Although this circuit did not directly decide the issue, at least five other circuits in the period before *Byrd* did decide it, and they held squarely that 1934 claims are not arbitrable. *Mansbach v. Prescott, Ball & Turben*, 598 F.2d 1017, 1030 (6th Cir. 1979); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Moore*, 590 F.2d 823, 827-29 (10th Cir. 1978); *Weissbuch v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 558 F.2d 831, 833-36 (7th Cir. 1977); *Allegaert v. Perot*, 548 F.2d 432, 437 (2d Cir.), *cert. denied*, 432 U.S. 910 (1977); *Sawyer v. Raymond, James & Associates, Inc.*, 642 F.2d 791, 792 (5th Cir. 1981). *See also Surman v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 733 F.2d 59, 61 (8th Cir. 1984); *Belke v. Merrill Lynch, Pierce, Fenner & Smith*, 693 F.2d 1023, 1025-26 (11th Cir. 1982);

Ayres v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 538 F.2d 532, 537 (3d Cir.), *cert. denied*, 429 U.S. 1010 (1976).

After the Supreme Court's opinions in *Byrd*, at least one circuit, the Second, has reaffirmed its pre-*Byrd* holding of non-arbitrability, reaching the same conclusion that we reach today. *McMahon v. Shearson/American Express, Inc.*, 788 F.2d 94 (2d Cir. 1986). The Second Circuit reasoned that clear circuit precedent, the similarity of '33 and '34 Act provisions, and "strong public policy concerns" precluded arbitration of claims under section 10(b).

Because our previous decisions have not addressed the issue squarely, we are free in this case to consider the issue appellants raise. We do so by examining, in light of the questions raised by Justice White, the statutes, their history, and their interpretation by the courts.

III.

DISCUSSION

Dean Witter claims that the Arbitration Act, 9 U.S.C. § 1, *et seq.*, requires arbitration of Conover's claims against it. The Arbitration Act provides that an arbitration agreement in a contract evidencing a transaction involving commerce or in a maritime transaction "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C.§ 2.

As Dean Witter points out, the Supreme Court repeatedly has enforced arbitration agreements in light of the strong federal policy evidenced in the Arbitration Act. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 105 S. Ct. 3346, 3355 (1985) (because of the international nature of the contract, the arbitration clause was valid in

regard to claims that might not be arbitrable under a domestic agreement); *Southland Corp. v. Keating*, 465 U.S. 1 (1984) (a California franchise law which invalidates arbitration agreements violates the supremacy clause); *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24-25 (1983) ("[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration").

The Arbitration Act, however, obviously does not automatically validate an arbitration agreement in the face of contrary congressional policy. *See, e.g. Wilko v. Swan*, 346 U.S. 427 (1953). In *Mitsubishi*, the Supreme Court explained why not all controversies implicating statutory rights are suitable for arbitration.

> Just as it is the congressional policy manifested in the federal Arbitration Act that requires courts liberally to construe the scope of arbitration agreements covered by the Act, it is the congressional intention expressed in some other statute on which the courts must rely to identify any category of claims as to which agreements to arbitrate will be held unenforceable.

Mitsubishi, 105 S. Ct. at 3355. Similarly, in *Wilko*, the Supreme Court recognized the tension between the respective policies of the Arbitration Act and the Securities Act of 1933. It considered the statutory language and purposes of the Acts, and concluded that "the intention of Congress concerning the sale of securities is better carried out by holding invalid such an agreement for arbitration . . . " 346 U.S. at 438.

Thus, the question in this case is whether congressional policy prohibits arbitration of claims arising under section 10(b) of the Securities Exchange Act of 1934, despite the strong federal policy favoring arbitration. To

determine Congress' intent, we study the text, and both the legislative and judicial history of the 1934 Act, with due regard for the purposes underlying the securities and arbitration statutes.

In determining congressional intent with respect to waiver of a judicial forum we look first to the language of the securities statutes. In *Wilko,* the Supreme Court found that section 14 of the Securities Act of 1933 was a manifestation of Congress' intent to prohibit waiver of the right to a judicial forum, even under a written arbitration agreement. Section 14 provides:

> Any condition, stipulation or provision binding any person acquiring any security to waive compliance with any provision of this subchapter or of the rules and regulations of the Commission shall be void.

15 U.S.C. § 77n. The *Wilko* Court reasoned that an arbitration agreement required a securities purchaser to waive compliance with section 22, which provides for enforcement of section 12(2) in state or federal court. It concluded that under section 14, such an agreement was void.

The Securities Exchange Act of 1934 contains a waiver provision almost identical to section 14 of the 1933 Act. Section 29(a) provides:

> Any condition, stipulation or provision binding any person to waive compliance with any provision of this chapter or of any rule or regulation thereunder, or of any rule of an exchange required thereby shall be void.

15 U.S.C. § 78cc(a). The 1934 Act restricts enforcement to the federal courts. 15 U.S.C. § 78aa. Thus, to the extent that *Wilko* rests upon the conclusion that an arbitration agreement is an impermissible waiver of enforcement rights arising pursuant to statute or regulations, the

similarity of the Acts' waiver provisions suggests that *Wilko's* result also would apply to claims arising under section 10(b) of the 1934 Act and Rule 10b-5.

Hence, several circuits have relied on the similarity between the anti-waiver provisions of the 1934 Act and the 1933 Act in refusing to compel arbitration of section 10(b) claims. *See Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Moore,* 590 F.2d 823, 827 (10th Cir. 1978); *Weissbuch v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,* 558 F.2d 831, 836 (7th Cir. 1977); *Ayers v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,* 538 F.2d 532, 536 (3d Cir.), *cert. denied,* 429 U.S. 1010 (1976). These courts reasoned that if the anti-waiver provision of the 1933 Act, which is almost identical to section 29(a) of the 1934 Act, renders an arbitration agreement between a brokerage firm and a customer void as to a customer's section 12(2) claim, then section 29(a) must have the same effect on a predispute agreement that would have required arbitration of a section 10(b) claim. *Weissbuch,* 558 F.2d at 836; *Ayers,* 538 F.2d at 536.

Despite the analogous waiver provisions in the 1933 Act and the 1934 Act, appellants contend that *Wilko's* reasoning should not be applied to the claim presented in this case, because the 1934 Act lacks an express provision for a private right of action under section 10(b). As Justice White pointed out, the original text of the 1934 Act, standing alone, is not conclusive as to whether a federal judicial forum exists at all for section 10(b) claims, much less as to whether the judicial forum can be waived.

> More important, the cause of action under § 10(b) and Rule 10b-5, involved here, is implied rather than expressed. . . . Moreover, *Wilko's* solicitude for the federal cause of action . . . is not necessarily appro-

> priate where the cause of action is judicially implied and not so different from the common law action.

Byrd, 105 S.Ct. at 1244 (White, J., concurring).

We therefore look beyond the original text of the Act to its subsequent history in Congress and the courts. That history tells us, first, that the implied cause of action in federal court under section 10(b) and Rule 10b-5 has become well-established, and its nonwaivable character has become well accepted by the Securities and Exchange Commission, the courts of appeals, and Congress itself. For histories of the origin and growth of section 10(b) actions, *see* 5A A. Jacobs, *Litigation and Practice under Rule 10(b)-5* § 8 (2d ed. 1985); L. Loss, *Securities Regulation,* 1763-64 and nn. 260-63 (2d ed. 1961) and 6 *id.* at 3871-73 (Supp. 1969). In 1979, the Securities and Exchange Commission issued a Release warning broker-dealers that customers should be made aware that they have a right to a judicial forum to pursue claims under both the 1933 and 1934 Acts, notwithstanding their arbitration agreements. Sec. Exch. Act release No. 15984 (July 2, 1979), 17 SEC Docket 1167 (1979), 1979 Fed. Sec. L. Rep. (CCH) ¶ 82,122.

The legislative and judicial history tells us, second, that Congress could have eliminated the federal cause of action for section 10(b) in 1975, when it undertook comprehensive revision of the 1933 and 1934 Acts, had it chosen to do so. Congress' revision, however, left section 10(b) intact.

The history tells us, third, and most important, that in 1975, Congress expressly recognized the non-arbitrable nature of disputes between brokers and customers. In the conference report to the Securities Act Amendment of 1975, Congress emphasized that its amendment to section 28 of the Securities Exchange Act of 1934, which permit-

ted arbitration agreements between brokers and exchanges, did not extend to arbitration agreements between brokers and customers:

> It was the clear understanding of the conferees that this amendment did not change existing law, as articulated in *Wilko v. Swan*, 346 U.S. 427 (1953), concerning the effect of arbitration proceeding provisions in agreements entered into by persons dealing with members and participants of self-regulatory organizations.

H.R. Rep. No. 229, 94th Cong., 1st Sess. 111, *reprinted in* 1975 U.S. Code Cong. & Ad. News 321, 342.

This legislative history is compelling, as two of our sister circuits have recognized in holding that section 10(b) claims are nonarbitrable. In *Ayres v. Merrill, Lynch, Pierce, Fenner, & Smith, Inc.*, the Third Circuit noted this language in the conference report, and concluded, "Congress appears to have accepted the view that *Wilko v. Swan* applies in the 10b-5 context." 538 F.2d at 537; *see also Weissbuch*, 558 F.2d at 836. The Supreme Court has stated in a related context that Congress' decision to leave section 10(b) intact suggests ratification of a judicial remedy under section 10(b). *Herman & MacLean v. Huddleston*, 459 U.S. 375, 384-86 (1983); *see also Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 379, 381-82 (1982) (finding that Congress' comprehensive amendments to the Commodities Exchange Act was evidence that Congress intended to preserve the implied remedy under the Act).

The policies served by judicial enforcement of section 10(b) and Rule 10b-5 reflect the unsuitability of arbitration for such claims. This can be seen in the many opinions of the Supreme Court and courts of appeals involving section 10(b). The leading opinion in this cir-

cuit is *Fratt v. Robinson*, 203 F.2d 627 (9th Cir. 1953). We there held that section 10(b) implies a private right of action, primarily because the deterrent effect of private enforcement of section 10(b) is necessary to accomplish both that section's purpose and the 1934 Act's general purpose of establishing "reasonably complete and effective" control over securities transactions. *Id.* at 632. In gauging the potential of section 10(b) actions to deter fraudulent practices, we placed particular emphasis on the fact that violations would be redressable in federal court. *See id*, at 631, 632. We have reaffirmed our holding in *Fratt* in *Ellis v. Carter*, 291 F.2d 270 (9th Cir. 1961); *Matheson v. Armbrust*, 284 F.2d 670 (9th Cir. 1960), *cert. denied*, 365 U.S. 870 (1961); and in *Errion v. Connell*, 236 F.2d 447 (9th Cir. 1956). The *Fratt* rationale views the 1933 and 1934 Acts as a comprehensive scheme to regulate securities, *see Fratt*, 203 F.2d at 631-32; *accord Herman & MacLean v. Huddleston*, 459 U.S. 375, 380 (1983).

Other circuits have adopted *Fratt*'s reasoning and have similarly stressed the need for judicial control over securities transactions. *See Jordan Building Corp. v. Doyle, O'Connor & Co.*, 401 F.2d 47, 49 (7th Cir. 1968), and *Brouk v. Managed Funds, Inc.*, 286 F.2d 901, 907 (8th Cir. 1961), *vacated as moot*, 369 U.S. 424 (1962). The Supreme Court used similar reasoning in *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 730 (1975), and *J.I. Case Company v. Borak*, 377 U.S. 426, 432 (1964) (private enforcement of Rule 10b-5 may "[provide] a necessary supplement to Commission action").

The express lesson drawn by the Supreme Court is that the 1933 and 1934 Acts are interrelated components of the federal securities regulation scheme. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 206 (1976). They are to be given "a cumulative construction" which "furthers their broad

remedial purposes." *Herman*, 459 U.S. at 386. This same rationale also has been influential in deciding other questions of section 10(b) liability and interpreting its remedial purposes broadly. *See, e.g., Sargent v. Genesco, Inc.*, 492 F.2d 750, 760 (5th Cir. 1974) (broad privity requirement is necessary to implement the private enforcement remedy); *James v. Gerber Products Co.*, 483 F.2d 944, 950 (6th Cir. 1973) (private enforcement should be encouraged to effectuate purpose of § 10(b)). This lesson cannot be reconciled with appellants' position that a judicial forum is less appropriate for 1934 Act claims than for 1933 Act claims.

This can be demonstrated further by comparing the reasons for non-arbitrability under the 1933 Act, as discussed in *Wilko,* with the considerations relevant to the 1934 Act and section 10(b). In *Wilko,* the Supreme Court gave three main reasons for concluding that Congress intended, by the nonwaiver provisions of section 14, to void agreements to arbitrate 1933 Act claims: first, securities customers are subject to overbearing by securities dealers; second, arbitration is not the equivalent of judicial proceedings in securities cases under the 1933 Act, because judicial direction is needed to insure the effectiveness of the protective provisions of the Act; and third, because of the special jurisdictional and procedural protections of the 1933 Act, a securities customer surrenders more by agreeing to arbitrate claims under the Act than would a person who agrees to arbitrate a normal business transaction claim. *Wilko,* 346 U.S. at 431-33, 435-37.

All of these considerations favoring non-arbitrability apply with at least equal force to section 10(b) claims like the one before us. First, the bargaining position between dealers and customers is no different with respect to section 10(b) claims than with respect to any other securities claim. Dealers are as likely to "maneuver buy-

ers into a position that might weaken their ability to recover," *Wilko,* 346 U.S. at 432, under the 1934 Act as they are under the 1933 Act. In *Weissbuch,* 558 F.2d at 835, the Seventh Circuit examined buyers' disadvantages in purchasing securities before concluding that the customer's section 10(b) claim should not be arbitrated.

Weissbuch followed on the heels of the Supreme Court's decision in *Scherk v. Alberto-Culver Co.,* 417 U.S. 506 (1974) which had held that an agreement to arbitrate section 10(b) claims arising out of an international transaction should be enforced. The issue in *Weissbuch* was whether to extend *Scherk* to section 10(b) claims arising under domestic contracts. The Seventh Circuit in *Weissbuch* distinguished *Scherk* by pointing out:

> [a]nother consideration at play in both the *Wilko* and *Scherk* cases was the bargaining posture of the parties. The holding in *Wilko* was directed at protecting . . . 'the relatively uninformed individual investor.' Lacking bargaining power and extensive information about his investment, this type of individual is most vulnerable to securities swindles and in most need of the special protection and remedies afforded by the Securities laws. It would be admittedly incongruous to attach this kind of disparity in leverage to the situation in *Scherk* where both parties possessed formidable financial interest and where their arbitration agreement emerged from a period of prolonged and extensive negotiations.

Weissbuch, 558 F.2d at 835. We agree that here our concern also must be for the "relatively uninformed individual investor," *id.,* as in *Wilko* and *Weissbuch,* rather than for parties with equal bargaining power who have negotiated an arbitration agreement, as in *Scherk.*

Second, the need for "the exercise of judicial direction to fairly assure [the Act's] effectiveness," *Wilko,* 346 U.S. at 437, is the same under the 1934 Act as it is under the 1933 Act. *See Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Moore,* 590 F.2d at 826. In concluding that claims under the securities laws should not be subject to arbitration, the Second Circuit in *Allegaert v. Perot,* 548 F.2d 432, 437 (2d Cir. 1977), stressed the difference between judicial proceedings and arbitration. It stated " '[t]his type of question concerning fraud within the meaning of Rule 10b-5 is properly litigated in the courts where a complete record is kept of the proceeding and findings and conclusions are made.' " *Allegaert,* 548 F.2d at 437, quoting *Greater Continental Corp. v. Schechter,* 422 F.2d 1100, 1103 (2d Cir. 1970). *Allegaert's* language echoes the Court's concerns in *Wilko:*

> Even though the provisions of the Securities Act, advantageous to the buyer, apply their effectiveness in application is lessened in arbitration as compared to judicial proceedings. Determination of the quality of a commodity or the amount of money due under a contract is not the type of issue here involved. This case requires subjective findings on the purpose and knowledge of an alleged violator of the Act. They must not only be determined but applied by the arbitrators without judicial instruction on the law. As their award may be made without explanation of their reasons and without a complete record of their proceedings, the arbitrators' conception of the legal meaning of such statutory requirements as "burden of proof," "reasonable care" or "material fact," . . . cannot be examined. [Furthermore, p]ower to vacate an award is limited.

Wilko, 346 U.S. at 435-436 (footnotes omitted). For other cases comparing the relative merits of judicial proceed-

ings and arbitration, see *Marchese v. Shearson Hayden Stone, Inc.*, 734 F.2d 414, 419-421 (9th Cir. 1984) (declaratory relief action concerning the interpretation of the Commodities Exchange Act is not arbitrable); *Amaro v. Continental Can Co.*, 724 F.2d 747, 750 n.3 (9th Cir. 1984) (arbitration award on grievance under a collective bargaining agreement was not res judicata of Employee Retirement Income Security Act claim); *Stroh Container Co. v. Delphi Industries, Inc.*, 783 F.2d 743, 751 n.12 (8th Cir.), *cert. denied*, 106 S. Ct. 2249 (1986) (action to confirm an arbitration award).

The third *Wilko* factor, the 1933 Act's protections to ensure a judicial forum, are also present in the 1934 Act for section 10(b) claims. The requirements for diversity jurisdiction need not be met to bring a claim under section 10(b), and even in cases in which diversity jurisdiction can be established, a section 10(b) plaintiff has greater service-of-process and venue resources than does a diversity plaintiff. There is no amount in controversy requirement. Section 27, the jurisdictional section of the 1934 Act, provides for nationwide service of process, as does section 22 of the 1933 Act. *See* 15 U.S.C. § 78aa (section 27 of the 1934 Act); 15 U.S.C. § 77v (section 22 of the 1933 Act).

In fact, the 1934 Act provides even greater venue choices than does the 1933 Act. *Compare* 15 U.S.C. § 78aa (section 27 of the 1934 Act) (any district where the defendant is found, inhabits or transacts business, or "where any act or transaction constituting the violation occurred") *with* 15 U.S.C. § 77v (section 22 of the 1933 Act) (any district where the defendant is found, inhabits or transacts business, "or in the district where the offer of sale took place"). Both venue provisions are broader than those applicable to diversity suits. *See* 28 U.S.C. § 1391. Finally, while the 1933 Act grants concurrent jurisdiction

to federal and state courts, the 1934 Act vests exclusive jurisdiction in the federal courts. This distinction is an even more forceful indication of Congress' intent that federal courts oversee the interpretation and application of the 1934 Act. We therefore conclude that the factors that led the *Wilko* Court to conclude that Congress intended to preclude enforcement of arbitration agreements under the 1933 Act can be no less applicable to claims under the 1934 Act.

Our holding, that Congress intended to preclude enforcement of agreements to arbitrate claims arising under section 10(b) of the Securities Exchange Act of 1934, comports with the legislative history and purposes of the 1934 Act, as well as with the Supreme Court's analysis of similar claims under the 1933 Act. We therefore affirm the district court's order denying Dean Witter's motion to compel arbitration of Harry Conover's section 10(b) claims.

Affirmed.

APPENDIX B

No. CV 83-4809-RMT (Tx)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

HARRY R. CONOVER,
Plaintiff,

vs.

DEAN WITTER REYNOLDS INC., et al.,
Defendants.

ORDER DENYING MOTION TO COMPEL ARBITRATION AND FOR STAY

This matter has come before the court on the motion by defendants Dean Witter Reynolds Inc. and Brenton Ogden to compel arbitration and for stay of proceedings. This court having considered the pleadings and other documents filed herein finds the following:

(1) The predispute agreement herein to arbitrate claims that arise under the Securities Exchange Act of 1934 is unenforceable. *Wilko v. Swan,* 346 U.S. 427 (1953); *DeLancie v. Birr, Wilson & Co.,* 648 F.2d 1255 (9th Cir. 1981); *Kershaw v. Dean Witter Reynolds, Inc.,* 734 F.2d 1327 (9th Cir. 1984); and

(2) Even if plaintiff's claim were arbitrable, defendant has waived any right to arbitration. *Shinto Shipping Co., Ltd. v. Fibrex & Shipping Co., Inc.,* 572 F.2d 1328 (9th Cir. 1978).

Accordingly,

IT IS ORDERED that the motion by defendants to compel arbitration and for stay of proceedings is respectfully denied.

Dated: June 12, 1985.

/s/
ROBERT M. TAKASUGI
United States District Judge

APPENDIX C

STATUTES AND REGULATIONS INVOLVED

United States Arbitration Act

9 U.S.C. § 2:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 3:

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

Securities Act of 1933

Section 12(2), 15 U.S.C. § 77 l(2):

> Any person who —

• • •

(2) offers or sells a security (whether or not exempted by the provisions of section 77c of this title, other than paragraph (2) of subsection (a) of said section), by the use of any means or instruments of transportation or communication in interstate commerce or of the mails, by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading (the purchaser not knowing of such untruth or omission), and who shall not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of such untruth or omission,

shall be liable to the person purchasing such security from him, who may sue either at law or in equity in any court of competent jurisdiction, to recover the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages if he no longer owns the security.

Section 14, 15 U.S.C. § 77n:

Any condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this subchapter or of the rules and regulations of the Commission shall be void.

Section 22(a), 15 U.S.C. § 77v:

(a) The district courts of the United States, and the United States courts of any Territory, shall have jurisdiction of offenses and violations under this subchapter and under the rules and regulations

promulgated by the Commission in respect thereto, and, concurrent with State and Territorial courts, of all suits in equity and actions at law brought to enforce any liability or duty created by this subchapter. Any such suit or action may be brought in the district wherein the defendant is found or is an inhabitant or transacts business, or in the district where the offer or sale took place, if the defendant participated therein, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 1254, 1291, and 1292 of Title 28. No case arising under this subchapter and brought in any State court of competent jurisdiction shall be removed to any court of the United States. No costs shall be assessed for or against the Commission in any proceeding under this subchapter brought by or against it in the Supreme Court or such other courts.

Securities Exchange Act of 1934

Section 10(b), 15 U.S.C. § 78j(b):

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange —

* * *

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as neces-

sary or appropriate in the public interest or for the protection of investors.

Section 29(a), 15 U.S.C. § 78cc(a):

> Any condition, stipulation, or provision binding any person to waive compliance with any provision of this chapter or of any rule or regulation thereunder, or of any rule of an exchange required thereby shall be void.

Securities and Exchange Commission,

Rule 10b-5, 17 C.F.R. § 240.10b-5:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,
>
> (a) To employ any device, scheme, or artifice to defraud,
>
> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,
>
> in connection with the purchase or sale of any security.

APPENDIX D.

Customer's Agreement.

[Letterhead]

DEAN WITTER & CO.
DW 101A-NEW #37-96131-33 MR. HARRY CONOVER
&
MRS. DOROTHY A. CONOVER

CUSTOMER'S AGREEMENT

Gentlemen:

In consideration of your accepting one or more accounts of the undersigned (whether designated by name, number or otherwise) and your agreeing to act as brokers for the undersigned in the purchase or sale of securities or commodities, the undersigned agrees as follows:

1. All transactions under this agreement shall be subject to the constitution, rules, regulations, customs and usages of the exchange or market, and its clearing house, if any, where the transactions are executed by you or your agents, and, where applicable, to the provisions of the Securities Exchange Act of 1934, the Commodities Exchange Act, and present and future acts amendatory thereof and supplemental thereto, and the rules and regulations of the Federal Securities and Exchange Commission, the Board of Governors of the Federal Reserve System and of the Secretary of Agriculture in so far as they may be applicable.

2. Whenever any statute shall be enacted which shall affect in any manner or be inconsistent with any of the provisions hereof, or whenever any rule or regulation shall be prescribed or promulgated by the New York Stock Exchange, the Federal Securities and Exchange Commission, the Board of Governors of the Federal

Reserve System and/or the Secretary of Agriculture which shall affect in any manner or be inconsistent with any of the provisions hereof, the provisions of this agreement so affected shall be deemed modified or superseded, as the case may be, by such statute, rule or regulation, and all other provisions of the agreement and the provisions as so modified or superseded, shall in all respects continue and be in full force and effect.

3. Except as herein otherwise expressly provided, no provision of this agreement shall in any respect be waived, altered, modified or amended unless such waiver, alteration, modification or amendment be committed to writing and signed by a member of your organization.

4. All monies, securities, commodities or other property which you may at any time be carrying for the undersigned or which may at any time be in your possession for any purpose, including safekeeping, shall be subject to a general lien for the discharge of all obligations of the undersigned to you, irrespective of whether or not you have made advances in connection with such securities, commodities or other property, and irrespective of the number of accounts the undersigned may have with you.

5. All securities and commodities or any other property, now or hereafter held by you, or carried by you for the undersigned (either individually or jointly with others), or deposited to secure the same, may from time to time and without notice to me, be carried in your general loans and may be pledged, re-pledged, hypothecated or re-hypothecated, separately or in common with other securities and commodities or any other property, for the sum due to you thereon or for a greater sum and without retaining in your possession and control for delivery a like amount of similar securities or commodities.

6. Debit balances of the accounts of the undersigned shall be charged with interest, in accordance with your usual custom, and with any increase in rates caused by money market conditions, and with such other charges as you may make to cover your facilities and extra services.

7. You are hereby authorized, in your discretion, should the undersigned die or should you for any reason whatsoever deem it necessary for your protection, to sell any or all of the securities and commodities or other property which may be in your possession or which you may be carrying for the undersigned (either individually or jointly with others), or to buy in any securities, commodities or other property of which the account or accounts of the undersigned may be short, or cancel any outstanding orders in order to close out the account or accounts of the undersigned in whole or in part or in order to close out any commitment made in behalf of the undersigned. Such sale, purchase or cancellation may be made according to your judgment and may be made, at your discretion, on the exchange or other market where such business is then usually transacted, or at public auction or at private sale, without advertising the same and without notice to the undersigned or to the personal representatives of the undersigned, and without prior tender, demand or call of any kind upon the undersigned or upon the personal representatives of the undersigned, and you may purchase the whole or any part thereof free from any right of redemption, and the undersigned shall remain liable for any deficiency; it being understood that a prior tender, demand or call of any kind from you, or prior notice from you, of the time and place of such sale or purchase shall not be considered a waiver of your right to sell or buy any securities and/or commodities and/or other property held by you, or owed you by the undersigned, at any time as hereinbefore provided.

8. The undersigned will at all times maintain margins for said accounts, as required by you from time to time.

9. The undersigned undertakes, at any time upon your demand, to discharge obligations of the undersigned to you, or, in the event of a closing of any account of the undersigned in whole or in part, to pay you the deficiency, if any, and no oral agreement or instructions to the contrary shall be recognized or enforceable.

10. In case of the sale of any security, commodity, or other property by you at the direction of the undersigned and your inability to deliver the same to the purchaser by reason of failure of the undersigned to supply you therewith, then and in such event, the undersigned authorizes you to borrow any security, commodity, or other property necessary to make delivery thereof, and the undersigned hereby agrees to be responsible for any loss which you may sustain thereby and any premiums which you may be required to pay thereon, and for any loss which you may sustain by reason of your inability to borrow the security, commodity, or other property sold.

11. At any time and from time to time, in your discretion, you may without notice to the undersigned apply and/or transfer any or all monies, securities, commodities and/or other property of the undersigned interchangeably between any accounts of the undersigned (other than from Regulated Commodity Accounts).

12. It is understood and agreed that the undersigned, when placing with you any sell order for short account, will designate it as such and hereby authorizes you to mark such order as being "short", and when placing with you any order for long account, will designate it as such and hereby authorizes you to mark such order as being "long". Any sell order which the undersigned shall designate as being for long account as above provided, is for

securities then owned by the undersigned and, if such securities are not then deliverable by you from any account of the undersigned, the placing of such order shall constitute a representation by the undersigned that it is impracticable for him then to deliver such securities to you but that he will deliver them as soon as it is possible for him to do so without undue inconvenience or expense.

13. In all transactions between you and the undersigned, the undersigned understands that you are acting as the brokers of the undersigned, except when you disclose to the undersigned in writing at or before the completion of a particular transaction that you are acting, with respect to such transaction, as dealers for your own account or as brokers for some other person.

14. Reports of the execution of orders and statements of the accounts of the undersigned shall be conclusive if not objected to in writing, the former within two days, and the latter within ten days, after forwarding by you to the undersigned by mail or otherwise.

15. Communications may be sent to the undersigned at the address of the undersigned given below, or at such other address as the undersigned may hereafter give you in writing, and all communications so sent, whether by mail, telegraph, messenger or otherwise, shall be deemed given to the undersigned personally, whether actually received or not.

16. Any controversy between you and the undersigned arising out of or relating to this contract or the breach thereof, shall be settled by arbitration, in accordance with the rules, then obtaining, of either the Arbitration Committee of the Chamber of Commerce of the State of New York, or the American Arbitration Association, or the Board of Arbitration of the New York Stock Exchange, as the undersigned may elect. If the undersigned does not

make such election by registered mail addressed to you at your main office within five (5) days after receipt of notification from you requesting such election, then the undersigned authorizes you to make such election in behalf of the undersigned. Any arbitration hereunder shall be before at least three arbitrators and the award of the arbitrators, or of a majority of them, shall be final, and judgment upon the award rendered may be entered in any court, state or federal, having jurisdiction.

17. This agreement and its enforcement shall be governed by the laws of the State of New York and its provisions shall be continuous; shall cover individually and collectively all accounts which the undersigned may open or re-open with you, and shall enure to the benefit of your present organization, and any successor organization, irrespective of any change or changes at any time in the personnel thereof, for any cause whatsoever, and of the assigns of your present organization or any successor organization, and shall be binding upon the undersigned and/or the estate, executors, administrators and assigns of the undersigned.

18. The undersigned, if an individual, represents that the undersigned is of full age, that the undersigned is not an employee of any exchange, or of any corporation of which any exchange owns a majority of the capital stock, or of a member of any exchange, or of a member firm or member corporation registered on any exchange, or of a bank, trust company, insurance company or of any corporation, firm or individual engaged in the business of dealing, either as broker or as principal, in securities, bills of exchange, acceptances or other forms of commercial paper. The undersigned further represents that no one except the undersigned (and, to the extent community property stands in the account or accounts, his or her

spouse) has an interest in the account or accounts of the undersigned with you.

Dated, 17 August 1960, North Hollywood, California.

Very truly yours,
/s/ HARRY R. CONOVER
/s/ MRS. DOROTHY A. CONOVER

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On August 28, 1986, I served the within Petition for Writ of Certiorari in re: "Dean Witter Reynolds Inc. and Brenton Ogden -v- Harry R. Conover" in the United States Supreme Court, October Term 1986, No. .....;

on the parties in said action, by placing three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

Gregory L. Dillion, Esq.
Newmeyer, Landrum & Dillion
840 Newport Center Drive, Suite 340
Newport Beach, CA 92660

All Parties required to be served have been served.

I declare, under penalty of perjury, that the foregoing is true and correct.

Executed on August 28, 1986, at Los Angeles, California.

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CE CE MEDINA

Supreme Court, U.S.
FILED
NOV 18 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-321 (2)

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1986

DEAN WITTER REYNOLDS INC. and BRENTON OGDEN,

Petitioners,

vs.

HARRY R. CONOVER,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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8 pp

QUESTION PRESENTED

The controlling decisions of this Court and circuit courts have confirmed the parity between the implied remedy under Section 10(b) of the Securities Exchange Act of 1934 and the overlapping express remedies under the Securities Act of 1933 and stressed the need for a judicial forum for federal securities claims. Consequently, the question presented is whether, in light of the controlling case law, the language and history of the federal securities statutes manifest the nonarbitrability of Section 10(b) claims notwithstanding a predispute agreement to arbitrate such claims.

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No. 86-321

In The
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October Term, 1986

DEAN WITTER REYNOLDS INC. and
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BECAUSE THIS COURT HAS ALREADY AGREED TO HEAR THE ISSUE PRESENTED BY THIS PETITION AND BECAUSE OF THE OBVIOUS CONFLICT AMONG THE CIRCUITS, RESPONDENT HAS NO REASONABLE BASIS FOR OPPOSING CERTIORARI.

The issue presented by this petition is virtually identical to one of the primary issues presented by the petition filed

in *McMahon v. Shearson/American Express, Inc.*[1] *("McMahon").* Because this Court has granted the petition for certiorari in *McMahon*[2] and because of the undeniable split among the circuits on the issue presented by this petition,[3] respondent has no reasonable basis for opposing certiorari. In fact, inasmuch as this Court's decision in *McMahon* could control the ultimate disposition of the issue presented by this petition, it is important that respondent be permitted to fully present his views before this Court.

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1 788 F.2d 94 (2nd Cir. 1986), Petition for Cert. filed, 55 U.S.L.W. 3032 (U.S. July 4, 1986), Petition for Cert. granted, 55 U.S.L.W. 3231 (U.S. October 6, 1986).

2 55 U.S.L.W. 3231 (U.S. October 6, 1986).

3 Since Petitioners filed this petition, the Eleventh Circuit, on rehearing *en banc*, and the Fifth Circuit, in a memorandum opinion, have affirmed the nonarbitrability of claims under Section 10(b) of the Securities Exchange Act of 1934 despite a predispute agreement to arbitrate such claims. *Wolfe v. E. F. Hutton & Co., Inc.*, 800 F.2d 1032 (11th Cir. 1986); *King v. Drexel Burnham Labert, Inc.*, 796 F.2d 59 (5th Cir. 1986), petition for cert. filed, 55 U.S.L.W. 3153 (U.S. August 25, 1986).

CONCLUSION

This Court has already recognized the importance of the issue presented by this petition and agreed to decide that issue in the context of another case. For these reasons, respondent cannot oppose certiorari and must respectfully request that certiorari be granted.

Dated: November 14, 1986

Respectfully submitted,

GREGORY L. DILLION
Counsel of Record for Respondent;
and
THOMAS F. NEWMEYER
NEWMEYER, LANDRUM & DILLION

Attorneys for Respondent